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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1925

No. [redacted]271

BALTIMORE STEAMSHIP COMPANY and UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

Petitioners

against

VERNON PHILLIPS, an infant, by VERNON PHILLIPS, his Guardian *ad Litem*

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDGAR J. TREACY
Solicitor for Respondent

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IN THE

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OCTOBER TERM, 1925.

No. ——

BALTIMORE STEAMSHIP COMPANY and UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Petitioners,

v.

VERNON PHILLIPS, an Infant, by VERNON PHILLIPS, his Guardian, *ad litem.*

BRIEF IN OPPOSITION TO PETITION.

Statement of the Case.

This case has nothing to do with the Federal Employees' Compensation Act. The plaintiff was not a Federal employee. He was a member of the crew of the *West Cape*, a cargo vessel operated by the defendants (R., 100). At the time he signed articles he was eighteen years old and was going to school and working in vacation (R., 101). Although he had never been to sea before, he was put down on the articles as an able bodied seaman (R., 102). The ship left Baltimore in May, 1921, carrying grain and coal for British ports. Number 1 hold and Number 5 hold were fitted with shifting boards and after the grain had been discharged, the shifting boards were left in, and water

taken into the holds for ballast (R., 136). On the voyage home, the rolling of the water ballast knocked down and splintered the shifting boards in these holds. On Sunday, July 24, 1921, when the ship was within a day or two of her home port, the deck crew was set to work taking out the broken lumber from Number 1 hold (R., 139). One section of the hatch was taken off and one strongback was taken out at the main deck and one or two at the 'tween deck hatch; the rest of the strongbacks were allowed to remain in (R., 141). The dunnage was hoisted by a winch on the port side of Number 1 hatch, the second officer acting as winchman (R., 140). After the hoisting had commenced the plaintiff was ordered into Number 1 hold to clean the bilges (R., 105). While he was scooping the grain out of the starboard bilges, the wire fall which had been led into the forward part of Number 1 hold, fouled a strongback, and as the winchman continued to hoist away, the strongback was lifted out of its sockets and thrown into the hold upon the plaintiff (R., 144). His left leg was mangled so badly that it was later amputated above the knee (R., 108).

Action was brought in the Supreme Court of the State of New York, Nassau County, and removed to the United States District Court for the Eastern District of New York where the plaintiff recovered a verdict for Forty Thousand Dollars (R., 170). The judgment entered thereon was affirmed by the Circuit Court of Appeals for the Second Circuit (R., 239).

Before the commencement of this action, libel was filed in the United States District Court for the District of Maryland, entitled "Vernon L. Phillips, Jr., by Vernon L. Phillips, his next friend *v.* United States of America, the United States Shipping Board Emergency Fleet Corpora-

tion, now or late owners of the Steamship *West Cape*, and also the Baltimore Steamship Company, a body corporate, operators of said vessel" (R., 49). The proctor for libellant was E. Ridgley Simpson, who was then the attorney for the Baltimore Steamship Company, one of the respondents (R., 48, 59, 61). The amended libel, filed after exceptions to the libel, particularized libellant's claim and expressly specified that his claim for negligence was directed solely against the United States of America in failing to provide a seaworthy ship (R., 49). The amended libel reads as follows:

> "Libellant alleges that the negligence claimed consists in the failure of the respondent, the United States of America, to provide a cleat or socket of proper design and sufficient strength to support the strongback when one end of it was negligently knocked out of place by a load of dunnage being hoisted from the hold; further the officers of the Steamship *West Cape* were incompetent; further that the respondents owe a special duty to Vernon L. Phillips, Jr., because of his youth and inexperience, and libellant claims that in the event that negligence is not established for wages, maintenance and cure" (R., 49).

The cause was heard and resulted in a decree for maintenance and cure for Five Hundred Dollars and the attorneys immediately caused the decree to be marked "Satisfied" (R., 45).

Thereafter action was commenced under the Merchant Marine Act to recover damages for personal injuries; therein the plaintiff alleged and proved that his injuries were due to the negligence of his fellow servants. The United States of America was not a party to this lawsuit (R., 3). Therein the plaintiff recovered a judgment which

has been affirmed by the Circuit Court of Appeals for the Second Circuit upon the authority of *Troxell* v. *Del. L. & W. R. Co.*, 227 U. S., 434 (R., 237). This is the situation of which the petitioner complains.

Summary of the Argument.

The petitioner fails to show special and important reasons for granting the writ.

I. The decision of the Circuit Court of Appeals for the Second Circuit is not in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

II. The law of this case has been settled by the Supreme Court (*Troxell* v. *Del., L. & W. R. Co.*, 227 U. S., 434).

Argument.

The argument of petitioners commences with a statement that in the Baltimore and New York cases the same issues were raised by the pleadings. This is distinctly not so. The libel did not charge the respondents with the negligence of the officers and crew; and the amended libel only charged negligence against the United States of America in failing to provide a cleat or socket of proper design (R., 49).

In the action commenced in the Supreme Court of the State of New York, only the negligence of fellow servants was pleaded; and the United States of America was not a party to this lawsuit (R., 4).

The libel proceeded to a decree for maintenance and cure; and that was really the only issue tried in that proceeding (R., 51).

In the first case the libel alleged in substance, that the

officers of the vessel were incompetent and that the ship was unseaworthy (R., 47-50).

These allegations were not proven; therefore libellant recovered no indemnity.

In the second action, plaintiff made no allegations of incompetency of the officers or unseaworthiness of the ship. He did not repeat in his complaint any of the allegations of the libel. He alleged and proved that his injuries were due to the negligence of his fellow servants and he recovered a verdict for damages for personal injuries due to such negligence. The facts alleged and proved were totally distinct and the causes of action were totally distinct. Therefore, the admiralty decree for maintenance and cure, a right distinct from any right of action for damages for negligence, was not a bar to the second cause of action for damages for negligence of fellow servants.

In *Rolph Navigation and Coal Co.* v. *Kohilas*, 299 Fed., 52, a libel was filed for damages for beatings sustained by Kohilas, a seaman, at the hands of the mate of the *Rolph*. The respondents pleaded and proved that Kohilas had recovered his wages and maintenance for the voyage in another proceeding, and that therefore the prior decree was a bar to the present action.

Hunt, Circuit Judge, on page 54, said:

> "The evidence is in harmony with the conclusion of the District Judge, and as Kohilas has recovered in another proceeding for wages and maintenance, and makes no claim herein for expenses and cure, the principal question presented is whether the vessel can be held liable to an indemnity for injuries in consequence of the hiring and retention of Hansen as mate."

And on page 55:

> "Nor should Kohilas be precluded from recovering because of the fact that in another proceeding for wages and maintenance he recovered. His right to wages, maintenance and expenses of cure existed under any and all circumstances, unless there was wilful misconduct; but his right to recover an indemnity is a separate matter."

This is not a case, as petitioners contend, of splitting a single cause of action into several suits, or dividing an action for personal injuries into several successive actions for different grounds of negligence. Here the plaintiff had two distinct causes of action independent of each other, one for maintenance and cure, and another for damages for personal injuries. He might unite them or separate them if he desired. A judgment upon one cause of action could not be a bar to a suit upon the other. It might as well be argued that a plaintiff could not recover a verdict in an action for damages for personal injuries, because in a prior action he had recovered a verdict against the same defendant in a suit upon a promissory note.

The most that petitioners can claim is that the plaintiff was wrongfully and fraudulently persuaded to pursue a remedy that did not exist. But the fact that he has done so, is not a bar to a suit upon a rightful cause of action.

I.

The decision of the Circuit Court of Appeals for the Second Circuit is not in conflict with the decisions of other Circuit Courts of Appeals on the same subject.

The petitioners base their application for a writ upon the cases of *Columb* v. *Webster Manufacturing Co.* (C. C. A., 1st), 84 Fed., 592, and *Miller* v. *Spokane International Ry. Co.* (C. C. A., 9th), 293 Fed., 748. These authorities are not controlling. It is also argued that they are in conflict with the decision of the Circuit Court of Appeals for the Second Circuit. *Columb* v. *Webster Manufacturing Co.* (84 Fed., 592), which is petitioners' main reliance, was before the Supreme Court in Troxell's case. It was cited by the defendant-in-error. *Miller* v. *Spokane International Ry. Co.*, 293 Fed., 748, was decided upon the authority of *Stark* v. *Starr*, 94 U. S., 477, and that case was also before the Supreme Court and was also cited in Troxell's case. The Supreme Court has considered these decisions and for the purpose of our case has overruled them. It can certainly not be argued that there is a conflict in the decisions of Circuit Courts of Appeals when a late decision in one circuit does not follow decisions in other circuits which have been overruled by the Supreme Court. The interpretation of the law by the supreme tribunal is binding. When the Supreme Court has decided, the conflict must subside; there remains no conflict of inferior decisions.

Moreover, *Miller* v. *Spokane International Ry. Co.*, 293 Fed., 748, and *Stark* v. *Starr*, 94 U. S., 477, and *United States* v. *California & Oregon Land Co.*, 192 U. S., 355, held that a party may not split up a claim or cause of action and prosecute it by piecemeal. But this was not the

situation here. In our case, the plaintiff had a claim for maintenance and cure upon which he recovered. It is true that in his pleading he mixed it up with another theory of action which did not exist. He tried to mingle his claim for wages with a non-existent right of action. That does not bar him from a recovery on another totally distinct and different claim.

II.

Troxell v. Delaware, Lackawanna & Western Railroad Co., 227 U. S., 434, is the law of this case.

In *Troxell* v. *Del., L. & W. R. Co.*, 227 U. S. 434, the action was brought in the Circuit Court for the Eastern District of Pennsylvania under the Federal Employers Liability Act by Lizzie M. Troxell, Administratrix of Joseph D. Troxell, against Delaware, Lackawanna and Western Railroad Co. to recover damages for wrongful death. A verdict was rendered by the District Court in favor of the plaintiff, and reversed by the Circuit Court of Appeals, Third Circuit, and brought to the Supreme Court on writ of error.

The decedent was a fireman in the employ of the defendant. He was killed in a collision between two trains. The day before his death some of the employees of the defendant had shifted a number of gondola cars upon a siding. At this point there was a down grade to the west, and on the day following the shifting of the cars, they started in motion and ran on a track upon which the decedent was driving an eastbound train. He was killed in the collision. The plaintiff brought a prior action against the defendant, stating that the decedent was a fireman in Interstate Commerce and because of the negli-

gence of the defendant in failing to keep its devices and apparatus in good order and condition, the collision occurred. She recovered a verdict which was reversed by the Circuit Court of Appeals. Thereafter she began the present action under the Federal Employers Liability Act. The plaintiff again recovered a verdict and the Circuit Court of Appeals reversed the judgment, holding that the first action was a bar. The record shows that on the first trial the District Judge held that the Federal Act should not be considered in determining the case, and that it was brought under the Statutes of the State of Pennsylvania. In such an action there could be no recovery because of the negligence of the fellow workmen of Troxell. In the first action, the Court held that no question of the negligence of fellow servants was submitted, and the jury was confined to the question of responsibility for failing to provide proper safety appliances to prevent cars from running down the grade in the manner they had, if left unbraked. The Circuit Court of Appeals stated that the case might be brought under the State Act, notwithstanding the Federal Employers Liability Act, and concluded to reverse the judgment. The second action was brought under the Federal Employers Liability Act, under which there might be a recovery for the negligence of the fellow servants of the decedent, and the District Court held that the former case had adjudicated matters as to defects in the cars, engines and rails, and submitted to the jury only the question of the negligence of fellow servants. The plaintiff recovered a verdict which was reversed by the Circuit Court of Appeals on the grounds that the judgment in the first case was a bar; because an action of this kind for injury to one engaged in Interstate Commerce could only be maintained under

the Federal Act, and in the second action the plaintiff was merely offering to prove facts that might have been proved on the first trial. On writ of error to the Supreme Court the judgment of the Circuit Court of Appeals was reversed, Mr. Justice Day delivering the opinion. On page 442, he said:

> "We think it is apparent from what we have said that the first case was prosecuted and tried upon the theory that it involved a cause of action under the State Law of Pennsylvania. It was so submitted to the jury and they were told that they were not to consider the Federal Law, but recovery should be based upon the right under the State Act. If the Circuit Court of Appeals was right in its second decision, that no action could have been maintained under the State Law in view of the Employers Liability Act, the fact that the plaintiff attempted to recover under that law and pursued the supposed remedy until the court judged that it had never existed, would not of itself preclude the subsequent pursuit of a remedy for relief to which in law she is entitled.
>
> "Whether the plaintiff could properly have thus recovered is not the question now before the court. To work an estoppel the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties. The cause of action under the State Law if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under the Federal Statute. Under the Pennsylvania Law, there could be no recovery for the negligence of the fellow servants of the deceased. This was the issue upon which the case was submitted at the second trial and a recovery had. Whether the plaintiff

> could recover under the Pennsylvania Statute was not involved in the second action, and the plaintiff's right to recover because of the injury by the negligence of the fellow servants was not involved in or concluded by the first suit."

Troxell's case and the instant case present a deadly parallel.

1. Pursuit of a non-existent remedy does not make the matter *res judicata* when the existent remedy is pursued. This is applicable to both cases. Mrs. Troxell might have brought her first action under the Federal Employees' Act. What she might have done in the first action was not before the court in the second suit. Petitioner says that Phillips might have brought his second cause of action in Baltimore. Whether he might or not, is not the question before the court now.

2. The plaintiff was not estopped by the judgment in the first suit as to matters not tried because not admissible therein. This principle is applicable to the instant case because the negligence proven in the second suit was not pleaded in the first suit and so was not an admissible issue.

3. There was a difference in parties between the widow in her own right, and the widow as administratrix. But Troxell's case was not decided upon that ground. There is a difference in parties in the instant case. In the first proceeding the United States was charged with a breach of duty in furnishing an unseaworthy ship. In the second action, the United States was not a party.

We find in Troxell's case and in Phillips' case, a prior pursuit of a non-existent cause of action.

In the petition and the supporting brief much is said about the great public interest and importance of Phillips' case. True it is important to Phillips; and it is doubtless of great private interest to the petitioners to delay as long as possible the collection of this judgment.

Finally, Section 33 of the Act of June 5, 1920, c. 250, 41 Stat. 988, 1007, and the Act of April 22, 1908, c. 149, 35 Stat. 65, have already been passed upon by the Supreme Court. There is here no question of Federal Law which has not been settled by this Court.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari should be denied.

EDGAR J. TREACY,
Solicitor for Respondent.

January, 1926.

Vernon J. Jones